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In The

Supreme Court of the United States

DENNIS HECKER, JONNA DUANE,
AND JANICE RIGGINS,

Petitioners,

v

DEERE & COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* FRANK S. RAVITCH AND MARCIA L. McCORMICK IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS*[1]

Amicus, Frank S. Ravitch and Marcia L. McCormick, are scholars at American law schools whose interests focus on labor law, employee rights, or the law of investment funds.[2] *Amicus* have no financial stake in the outcome of this case but are interested in ensuring a uniform and coherent interpretation of ERISA We file this brief to urge this Court to clarify the proper scope of the fiduciary duties that plan fiduciaries owe to employee/beneficiaries with respect to the menu of options defined contribution or 401(k) plans supply to their employees. We are prompted to submit this brief because the decision in the case below, and the conflict among the circuits which it augments, has wide-ranging consequences for millions of American employees and the hundreds of billions of dollars invested in 401(k) plans

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief *See* SUP CT R 37 6 Counsel for petitioners filed a letter with the Clerk granting blanket consent to the filing of *Amicus* briefs A letter reflecting the consent of respondent to the filing of this brief has been filed with the Clerk of the Court The parties were notified ten days prior to the due date of this brief of the intention to file

[2] Frank S Ravitch is a Professor of Law at Michigan State University College of Law Marcia L McCormick is an Associate Professor of Law at Saint Louis University School of Law

ARGUMENT

I. The Seventh Circuit's Decision in this Case Will Foster Confusion for Employers and Employees Whose Plans are Subject to ERISA Because it is Inconsistent with the Nature of ERISA, Department of Labor Interpretations, and Significant Precedent

Petitioners Dennis Hecker, Jonna Duane, and Janice Riggins alleged in their well pleaded complaint that respondent violated its fiduciary duties under ERISA by delegating the operation of respondent's plan to Fidelity. Second Amended Complaint for Breach of Fiduciary Duty, *Hecker, et al v. Deere & Co., et al* (W.D. Wis., No 06-C-719-S, decided June 21, 2007) (complaint filed March 6, 2007). In doing so respondents failed to adequately monitor the plans, failed to assess whether fiduciary choices for the plan were appropriate for a plan of respondent's size, failed to determine the reasonableness of fees charged by Fidelity, and failed to address fiduciary's self dealing within the plan *Id* As a result, petitioners assert that respondent failed to live up to its fiduciary duties under §1132's requirements for plan fiduciaries. *Id* Given the increasing shift from defined benefit plans to defined contribution plans throughout the nation, the need for prudent management of 401(k) plans has never been more important, and confusion over the duties owed to plan beneficiaries by plan fiduciaries under ERISA has never been more risky to the health of our economy. Yet, the Seventh

Circuit panel upheld dismissal of petitioners' complaint on the pleadings with prejudice. *Hecker v Deere*, 556 F.3d 575 (7th Cir. 2009), *suppl. by Hecker v. Deere*, 569 F.3d 708 (7th Cir. 2009). The panel did so based on its reading of the so called "safe harbor" provision contained in ERISA §404(c), and by disregarding conflicting interpretations and precedent, including the interpretation of the "safe harbor" provision by the Department of Labor (DOL).

By artificially constraining the DOL's considered interpretation of the "safe harbor" provision in ERISA §404(c), *Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans)*, 57 FED. REG 46,906, 46,922 (October 13, 1992), 29 C F.R Part 2550.404c-1(d)(2) ("safe harbor" provision does not apply to "the act of designating investment alternatives"), ignoring long understood interpretations of ERISA, *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) ("Given [Section 404(a)'s] objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy"); *Fort Halifax Packing v. Coyne*, 482 U.S. 1, 15 (1987) (ERISA's focus "is on the administrative integrity of benefit plans – which presumes that some type of administrative activity is taking place"), *see also*, *Commissioner v. Clark*, 489 U.S. 726, 739-40 (1989) (when considering an exception to a general policy, courts "usually read the exception narrowly" to "preserve the primary operation of the policy"); *Phillips v. Walling*, 324 U.S

490, 493 (1945) (holding in context of the Fair Labor Standards Act that "[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed. . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people"), and rejecting conflicting precedent on a motion to dismiss, *DiFelice v. U.S. Airways, Inc*, 497 F.3d 410, 418 n.3 (4th Cir. 2007) (§404(c) "safe harbor" does not preclude claims based on imprudent selection of investment alternatives"); *In re Tyco Int'l, Ltd Multidistrict Litigation*, 606 F. Supp. 2d 166, 169 (D.N.H. 2009) (same); *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 65-66 (M.D.N.C. 2008) (same), the Seventh Circuit panel's decision creates confusion for employees and employers.

Employers in a variety of jurisdictions may now act based on the Seventh Circuit's decision only to find that their jurisdiction interprets the relevant provisions of ERISA differently from the Seventh Circuit based on the principles that ERISA is meant to be interpreted broadly in favor of plan beneficiaries. *John Hancock v. Harris Trust and Savings Bank*, 510 U.S. 86, 96 (1993) (noting connection between ERISA's "broadly protective purposes" and its fiduciary standards); *Central States v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985) ("In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of 'assuring the equitable character of the plans.' Thus, rather than explicitly

enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"). ERISA exemptions should be construed narrowly. *Varity Corp.*, 516 U S. at 513; *Fort Halifax Packing*, 482 U.S. at 15; *Commissioner v. Clark*, 489 U.S at 739-40; *Phillips v Walling*, 324 U.S. at 493 The Seventh Circuit failed to heed that precedent in this case, and did so in direct contravention of the DOL's considered interpretation. 57 FED. REG. 49,906, 46,922 (Oct. 13, 1992); Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir Mar. 19, 2008); Brief of the Secretary of Labor, Hilda L Solis, as Amicus Curiae in Support of Panel Rehearing, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 20, 2009).

The Seventh Circuit panel's failure to interpret the "safe harbor" exemption narrowly is also significant because as a practical matter most employees do not have the resources to make the best bargain with employers regarding the menu of options available to them under 401(k) plans, and these resources decrease as education levels among employees decrease. S Benartzi & R.H. Thaler, *Heuristics and Biases in Retirement Savings Behavior*, 21 J. OF ECONOMIC PERSP 81 (2007). Munnell & Sunden, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS (Brookings Inst. Press 2004). Thus, this Court's holdings that exemptions to general fiduciary duties under ERISA

are to be interpreted narrowly, *Varity Corp* , 516 U.S. at 513; *Fort Halifax Packing*, 482 U S. at 15; *Commissioner v. Clark*, 489 U.S. at 739-40, *Phillips v. Walling*, 324 U.S. at 493 (1945), are not only consistent with ERISA, but also with the practical reality faced by employees in defined · contribution plans throughout the nation

This reality is further complicated by the fact that employers currently have different duties under 29 U S.C. §1132 depending on where they are located Likewise, employees have different rights under that provision depending on where they live. Significantly, this is because of a split among the circuits regarding the interpretation of the "safe harbor" provision. *In re Washington Mut , Inc., Sec. Derivative & ERISA Lit* , 2009 WL 3246994 at *7 (W.D. Wash., Oct. 5, 2009) (acknowledging split between the circuits); *Page v Impac Mortgage Holdings, Inc.*, 2009 WL 890722, at *4 (C D. Cal., Mar 31, 2009) (same). Under such circumstances, there is a compelling reason for this Court to grant the petition of certiorari in this case U.S SUP. CT. R 10(a) (2009).

Were petitioners located within the jurisdiction of the United States Court of Appeals for the Fourth Circuit or within the jurisdiction of a number of Federal District Courts, petitioners would have easily survived a motion to dismiss. The same would be true in any jurisdiction that analyzed the motion to dismiss consistently with the DOL's guidance and the longstanding interpretation of ERISA by this Court, which requires that the statute should be interpreted

broadly in favor of plan beneficiaries and that ERISA exemptions, such as the "safe harbor" provision, should be construed narrowly.

A. The Seventh Circuit Panel Decision Disregards this Court's Holdings Regarding the Purpose and Interpretation of ERISA

This Court has explained that ERISA was designed to be interpreted broadly in favor of plan beneficiaries *Varity Corp* , 516 U.S. at 513; *John Hancock*, 510 U.S. at 96; *Central States*, 472 U.S. at 570. The Court has held that ERISA was designed with the purpose of protecting employee pension benefits and with the purpose of making clear what is required of employers so that they know their duties and rights throughout the nation. *Varity Corp* , 516 U.S. 489; *Fort Halifax Packing*, 482 U.S. at 15; *Central States*, 472 U.S. 559. This national predictability of rights and duties is further backed by the strong rules set forth by this Court regarding ERISA preemption. *Egelhoff v Egelhoff*, 532 U.S. 141, 149-50 (2001); *Fort Halifax*, 482 U.S. at 8-11 This predictability and uniformity benefits both employers and employees. *Egelhoff*, 532 U.S. at 149-50 ("Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators – burdens ultimately borne by the beneficiaries") (brackets in original); *Ingersoll-Rand*

Co v. McClendon, 498 U S. 133, 142 (1990) ("Particularly disruptive is the potential for conflict in substantive law. . . . Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement."); *Fort Halifax*, 482 U.S. at 9 ("The most efficient way to meet [employer] responsibilities [under ERISA] is to establish a uniform administrative scheme, which provides a set of standard procedures. . . . Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing states.") (brackets added).

Contrary to this Court's holdings, the Seventh Circuit panel's decision construes respondent's plan and respondent's duties in the manner least protective of plan beneficiaries. *Hecker v. Deere*, 556 F.3d 575 (7th Cir 2009), *suppl. by Hecker v Deere*, 569 F.3d 708 (7th Cir. 2009) This is not a case where the law clearly dictated a particular outcome on the motion to dismiss. In this case the petitioners' arguments had the support of the DOL and were consistent with a number of court decisions. Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 19, 2008); Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Panel Rehearing, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir Mar 20, 2009), *DiFelice*, 497 F.3d 410; *In re Tyco Int'l*, 606 F. Supp. 2d 166; *Tatum v R.J Reynolds Tobacco Co.*, 254 F R.D. 59; *see also Hecker*, 569 F 3d 708 (addressing

DOL's support of petitioners' interpretation of the "safe harbor" provision in this matter). By rejecting these arguments on a motion to dismiss the Seventh Circuit panel failed to heed this Court's message that ERISA was intended to be construed broadly in favor of plan beneficiaries, *Varity Corp.*, 516 U.S. at 513; *John Hancock*, 510 U S. at 96; *Central States*, 472 U.S. at 570, and that exemptions to such a "humanitarian and remedial" statutory framework should be interpreted narrowly. *Varity Corp.*, 516 U.S. at 513; *Fort Halifax Packing*, 482 U.S. at 15; *Commissioner v Clark*, 489 U.S at 739-40; *Phillips v Walling*, 324 U.S. at 493.

B. The Department of Labor's Interpretations Are Consistent with this Court's Holdings Regarding the Purpose and Interpretation of ERISA

The Seventh Circuit panel, on a motion to dismiss, rejected the guidance of the DOL regarding the applicability of the so called "safe harbor" provision set forth in §404(c) of ERISA. It did so ostensibly because the directly relevant statement in the DOL regulations was contained in the preamble. *Hecker*, 556 F.3d at 589; *Hecker*, 569 F.3d 708. Yet, the DOL promulgated these regulations after considerable public comment and consideration and has asserted that the preamble reflects DOL's consistent interpretation of the "safe harbor" provision which is entitled to deference under, *Chevron U.S.A Inc v Natural Res Def Council*, 467 U S 837 (1984) *See*

Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants at 15-17, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir Mar. 19, 2008).

The Seventh Circuit panel's new rule that a court, on a motion to dismiss, can disregard directly relevant language in regulations promulgated by the agency charged by Congress to enforce a law – language that narrowly construes an exemption – is inconsistent with this Court's guidance set forth above that ERISA exemptions should be construed narrowly, and with this Court's holdings addressed below in Section II, that a motion to dismiss should not be granted under Rule 12(b)(6) where the nonmoving party has a plausible argument (as will be explained below petitioner's argument was more than plausible). *See supra* Section I, I A.; *infra* Section II. Moreover, the DOL filed a brief supporting petitioner's position on the §404(c) "safe harbor" provision. Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 19, 2008); Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Panel Rehearing, *Hecker v Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 20, 2009). Therefore, the DOL itself argued in this litigation that its regulations support petitioners' case. *Id.* at 15-17.

C. Decisions by the United States Court of Appeals for the Fourth Circuit and Several United States District Courts, that Reject the Interpretation Set Forth in the Panel's Decision in this Case, Are Consistent With This Court's Holdings Regarding the Purpose and Interpretation of ERISA

The Seventh Circuit panel's decision conflicts with decisions by the United States Court of Appeals for the Fourth Circuit, *DiFelice*, 497 F.3d 410, and several district court opinions. *Tibble v. Edison Int'l*, 2009 WL 2382340 (C.D. Cal., July 16, 2009), *clarified on other grounds*, 2009 WL 2382348 (C.D. Cal., July 31, 2009); *Page v Impac Mortgage Holdings, Inc.*, 2009 WL 890722 (Mar. 31, 2009); *In re Tyco Int'l*, 606 F. Supp. 2d 166; *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59. It is consistent with a decision by a divided panel of the United States Court of Appeals for the Fifth Circuit, *Langbecker v. Electronic Data Sys Corp* , 476 F.3d 299 (5th Cir. 2007), and with District Court opinions in the Seventh Circuit, which must follow the decision below in this matter. *Lingis v Motorola, Inc.*, 2009 WL 1708097 (N.D. Ill., June 17, 2009); *Abbott v. Lockheed Martin*, 2009 WL 839099 (S D Ill., Mar. 31, 2009). Notably, there was a strong dissent from the Fifth Circuit panel's decision, and that dissent is consistent with the Fourth Circuit's decision in *DiFelice* and with the DOL regulations. *Langbecker*, 476 F 3d at 319 (Reavley, J., dissenting) This demonstrates a split among the

circuits that this Court should address. U S SUP CT R. 10(a) (2009).

The Fourth Circuit, *DiFelice*, 497 F.3d 410, several United States District Courts, *Tibble*, 2009 WL 2382340; *Page*, 2009 WL 890722; *In re Tyco Int'l*, 606 F. Supp. 2d 166; *Tatum v. R.J. Reynolds Tobacco Co* , 254 F.R.D. 59; the DOL, 57 FED. REG. 49,906, 46,922 (Oct. 13, 1992); Brief of the Secretary of Labor, Elaine L Chow, as Amicus Curiae in Support of Plaintiffs-Appellants at 15-17, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 19, 2008), a judge dissenting from the Fifth Circuit decision relied upon by the Seventh Circuit in the present matter, *Langbecker*, 476 F.3d at 319 (Reavley, J., dissenting), and petitioners argue that the so called "safe harbor" provision does not apply to claims of imprudent selection of investment options. That interpretation is more consistent with this Court's holdings that ERISA should be interpreted broadly in favor of plan beneficiaries, and that ERISA exemptions should be construed narrowly *See supra* Section I, I.A , I.B The decision by the Seventh Circuit panel in this case and the majority of the Fifth Circuit panel in *Langbecker*, 476 F.3d 299, construe the "safe harbor" provision broadly – especially when compared to the DOL and Fourth Circuit's interpretations – and in a manner that is most harmful to plan beneficiaries. This Court should grant the petition for certiorari in this case to clarify the conflict among the lower courts and overturn the Seventh Circuit panel's opinion in this case.

II. The Seventh Circuit's Decision In this Case Conflicts with Fundamental Principles of Civil Procedure

In *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007), this Court set forth the standards applicable to motions to dismiss on the pleadings. This Court held that where a complaint states a "plausible" basis for relief the complaint survives a motion to dismiss. *Iqbal*, ___ U S ___, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 556-59. A court still must construe factual allegations in the complaint as true, *Iqbal*, ___ U.S. ___, 129 S.Ct. at 1949-50; *Twombly*, 550 U.S. at 555, but this does not apply to legal allegations. *Id.* The reasons for this holding were clearly set forth by this Court in *Iqbal*, namely, requiring complainants to do more than list the elements of a legal claim without any factual support to suggest that the elements have been violated. *Iqbal*, ___ U S ___, 129 S Ct. at 1949-50, 1953-54.

Without stating such a plausible claim, this Court held, a complainant should not be able to proceed to the costly discovery process. *Id.* Significantly, the converse is also true. Where a complainant sets forth a plausible claim in the complaint a motion to dismiss on the pleadings should not be granted and the case should be allowed to move forward. *Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable

expectation that discovery will reveal evidence of illegal agreement" [a central issue in *Twombly*]); *Id* ("A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'").

Iqbal and *Twombly* do not alter the fact that a motion to dismiss on the pleadings is a gate-keeping motion, that is, when such a motion is granted with prejudice (as in this case) the complainant is locked out of court and precluded from seeking justice on the matter. Thus, under *Iqbal* and *Twombly*, as before, complaints should not be dismissed at the pleading stage on what ultimately would be the merits of the case. That is exactly what the Seventh Circuit panel did in this matter.

Petitioners set forth specific allegations in their complaint and connected those allegations to the legal claims asserted. Second Amended Complaint for Breach of Fiduciary Duty, *Hecker, et al v Deere & Co., et al* (W.D. Wis., No. 06-C-719-S, decided June 21, 2007) (complaint filed March 6, 2007). The complaint asserted more than a plausible claim as is evidenced by the fact that the DOL, the Fourth Circuit and several district courts support the actionability of such claims. *See supra* Section I.C. The Seventh Circuit panel argued that because the complaint anticipated the "safe harbor" defense under ERISA §404(c) it was brought into play for purposes of respondents' 12(b)(6) motion *Hecker*, 556 F.3d at 588-89. This may be true, but it simply means that the

Seventh Circuit panel could dismiss the case if the claims were implausible. *Twombly*, 550 U.S at 556. It does not mean that the Seventh Circuit panel should dismiss a plausible claim simply because it disagrees with it on the merits prior to discovery, and interprets the facts in a manner that supports the panel's own legal presuppositions as happened in this case. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 513 (2002) (Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits.); *Scheuer v Rhodes*, 416 U S. 232, 236 (1974) ("Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."), *Cf Twombly* at 556 ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'").

Simply put, the complaint in this case set forth adequate facts to support the plausibility of the legal allegations therein. *See* Second Amended Complaint for Breach of Fiduciary Duty, *Hecker, et al v Deere & Co., et al* (W.D. Wis., No 06-C-719-S, decided June 21, 2007) (complaint filed March 6, 2007) As noted above, there is a substantial amount of law that demonstrates the plausibility of petitioners' claims. *See supra* Sections I., I A., I.B , I C. The gate-keeping function for a motion to dismiss on the pleadings set forth in *Iqbal* and *Twombly* is not served by preventing complainants from seeking justice on plausible claims *Twombly*, 550 U S. 556 Those cases do not stand for the proposition that courts should

dismiss potentially successful claims because at the pleading stage a court does not agree with the legal assertions in the complaint. *Id.*; *Iqbal*, ___ U.S. ___, 129 S.Ct. at 1949-50, 1953-54. This Court should grant the petition for certiorari in this case to correct the grave injustice created by the Seventh Circuit panel's dismissal of the complaint with prejudice and to clarify the law due to the conflicting decisions of the United States Courts of Appeals on this important issue.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully request that this Court grant the writ of certiorari in this matter.

Respectfully submitted,

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